sentative, not because of any conversion, but because each has inherited at law that which in equity is due to the other. To put it the other way around, the vendor's right to the purchase money has passed to his representative, and the vendee's heir has inherited his ancestor's equitable estate in the land. From this seems deducible the general principle that whatever rights have been acquired under a specifically enforceable contract will descend in equity according as they partake of the character of realty or of personalty, and will be enforceable by the party on whom they devolve against the holder of the corresponding legal titles.

If this be sound, it supplies the solution to a question raised by the opinion in the case of *The Rockland-Rockport Lime Co.* v. *Leary* (N. Y. C't of Appeals, Dec. 12, 1911), not yet reported. The court below had decided that a lessee who had an option to purchase the fee properly notified the personal representative of the deceased lessor, rather than his heir, of his determination to exercise it, on the ground that the exercise of such option converted the property into personalty from the date of the lease. The Court of Appeals expressly overruled this holding, though it decided in favor of the lessee on another ground; and in so doing it took occasion to repudiate those cases representing the weight of authority which hold that in such circumstances the lessor's representative is entitled to receive the purchase money, and approved those holding that it goes to the heir. The former group of cases,[11] though criticised [12] and in at least one jurisdiction repudiated,[13] is, it is submitted, correct. Upon giving the option the lessor indeed retained the legal and equitable estate subject to the term. But the option being specifically enforceable,[14] he held the equitable estate subject to be divested upon the happening of a contingency: namely, upon the lessee's exercising his option. Furthermore, there arose in the lessor a right to receive purchase money upon the happening of the same contingency. This right, created under a contract made by the lessor and hence part of his personal assets, should devolve upon his representative under the principles above pointed out.

PRIORITY OF EQUITIES AND THE PURCHASE OF EQUITABLE INTERESTS.—It is elementary that if a trustee fraudulently sell to one with notice of the trust, this vendee is defenceless against the *cestui*,[1] for he has no equity in his behalf and the jurisdiction of good conscience is indifferent to his legal title.[2] His position, however, would be impreg-

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[11]Lawes *v.* Bennett (1785) 1 Cox Eq. 167; Townley *v.* Bedwell (1808) 14 Ves. Jr. 591; Collingwood *v.* Row (1857) 26 L. J. Ch. 649; Goold *v.* Teague (1858) 5 Jur. [N. s.] 116; Weeding *v.* Weeding (1861) 1 Johns. & H. 424; Kerr *v.* Day (1850) 14 Pa. 112.

[12]Collingwood *v.* Row *supra;* see Edwards *v.* West (1878) L. R. 7 Ch. D. 858.

[13]Smith *v.* Loewenstein (1893) 50 Oh. St. 346.

[14]Black *v.* Maddox (1898) 104 Ga. 157; McCormick *v.* Stephany (1898) 57 N. J. Eq. 257.

[1]Adair *v.* Shaw (1803) 1 Sch. & Lef. 243, 261; Smith *v.* Ayer (1879) 101 U. S. 320, 327.

[2]2 Pomeroy, Eq. Jur., § 739.

nable if he took for value and without notice;[3] for the *cestui,* having no complaint to make against his conduct, is barred from following the *res* and must rely on the personal liability of the trustee.[4] Furthermore, the innocent vendee can bestow the strength of his position on an alienee with notice;[5] for the latter's knowledge was not involved in the perpetration of the fraud upon the *cestui,* whose loss could not be ameliorated by restricting the innocent vendee in his range of possible alienees.[6] Therefore, from such a vendee all the world could take good title save only one, the fraudulent *cestui* himself, who is forever disabled from reacquiring the *res* free from the *cestui's* interest.[7] Any other holding would open a wide door to faithless trusteeship and emasculate the rule forbidding a trustee for sale to purchase from himself.[8]

Whether analogous results will be reached in the transference of the equitable interest depends on whether it is a true property right and can be cleanly transferred. Its nature, of course, is essentially different from the right of the legal owner of a *res.* A legal title is ultimate and anticipates nothing: the *cestui's* interest is a claim on the trustee and so looks forward to the co-operation of another person.[9] Accordingly, this divergence in character produces differences in behavior, as if, for instance, the co-operation of the obligor becomes impossible. Nevertheless, both seem to be property rights, equally susceptible of ownership[10] and therefore subject to the usual incidents attaching to the transference of ownership.[11] Thus, if a *cestui* assign part of his equitable interest and subsequently attempt to transfer the whole, the second assignee will take only what the *cestui* had left.[12] The reason is that the conveyance of the equitable interest is treated in the same manner in equity as the conveyance of the legal estate at law,[13] and the maxim of priority of equities need have nothing to do with the case.

So far, the analogy between the legal and equitable estates holds good, but it must be remembered that though a first assignor has the interest, and the second only an empty form, nevertheless if the second

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[3]Boone *v.* Chiles (1836) 10 Pet. 177, 210. The maxim that where the equities are equal the law will prevail, Townsend *v.* Little (1883) 109 U. S. 504, is of no help, for the usual question is, Are the equities equal?

[4]Adams *v.* Lambard (1889) 80 Cal. 426, 438; Boothe *v.* Fiest (1891) 80 Tex. 141.

[5]Boynton *v.* Rees (Mass. 1829) 8 Pick. 329.

[6]See Church *v.* Ruland (1870) 64 Pa. 432, 444.

[7]Bovy *v.* Smith (1682) 2 Ch. Cas. 124; Barrow's Case (1880) L. R. 14 Ch. D. 432, 445.

[8]Michoud *v.* Girod (1846) 4 How. 503, 553.

[9]Ames, Purchase for Value without Notice, 1 Harv. L. Rev. 11.

[10]Alger *v.* Scott (1873) 54 N. Y. 14; Grover *v.* Grover (Mass. 1835) 24 Pick. 261.

[11]Lewin, Trusts, 8; Donaldson *v.* Donaldson (1854) Kay 711; *cf.* Burgess *v.* Wheate (1759) 1 Eden 177, 215, where Lord Mansfield would have annihilated the trustee's interest.

[12]Putnam *v.* Story (1882) 132 Mass. 205; Muir *v.* Schenk (N. Y. 1842) 3 Hill 228.

[13]Muir *v.* Schenk *supra; cf.* Phillips *v.* Phillips (1861) 4 DeG. F. & J. 208, where the annuity is equivalent to a previous partial assignment. Ames, Cases on Trusts, 335, n. 3.

get in the legal title without knowledge of the prior interest, he will be in the usual position of a *bona fide* purchaser and cannot be disturbed.[14] This situation arises not in contradiction to the analogy between the transference of legal and equitable interests, but from the inherent nature of the equitable interest, which is a right *in personam* in the course of becoming a right *in rem*. Consequently, the hazard of losing the *res* necessarily attends its owner;[15] but it is a hazard which seems no more anomalous than the danger attendant upon legal ownership of being divested through the doctrines of confusion or accession or adverse possession. The conception of an equitable ownership lost through the equitable situation seems no more difficult than that of a legal ownership lost through operation of law.

Again, just as a legal estate, burdened with an equitable charge, passes to a *bona fide* purchaser stripped of the encumbrance, it would seem that an equitable estate similarly encumbered should also be protected. This conclusion has been reached[16] and is expressly based on the doctrine of *bona fide* purchase which, however, like the equitable maxims, seems to be only a more or less imposing way of saying that, under any given state of circumstances, the better equity will win.[17] Finally, it should follow that if the *cestui*, defrauded by a third party, sell to one without notice who in turn sells to one with notice, the latter should be safe, unless he be the trustee himself originally guilty of fraud. This result was reached in the recent case of *Yost* v. *Critcher* (Va. 1911) 72 S. E. 594, where a certain piece of real estate was conveyed to a trustee for himself and others, and he, by concealing the true value of the property, indirectly induced one of his associates to sell his interest to a *bona fide* purchaser who soon afterwards resold to the trustee. In impressing this repurchase with the trust, the court based the decision on the fiduciary relationship of the partnership situation, it being the duty of a managing partner to exercise the very highest degree of good faith towards his co-partner.[18] Though it seems impossible to base an actual partnership on a mere land deal without the carrying on of any business,[19] yet the court's decree is unquestionable, since an express trustee is bound to exercise every possible care.[20] And even in the absence of a trust, the fiduciary duty raised in a joint enterprise of this kind would justify the conclusion reached.[21]

ENFORCEMENT OF RESTRICTIVE AGREEMENTS IN EQUITY.—When land is granted subject to a restrictive agreement which falls short of a covenant which will run at law, and does not amount to the reservation of an easement, equity will nevertheless enforce the restrictions

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[14]See Newman *v.* Newman (1885) L. R. 28 Ch. D. 674, where the trustee cuts off the assignee's interest.

[15]Langdell, Eq. Pl., (2nd ed.) § 184.

[16]Lane *v.* Jackson (1855) 20 Beav. 535; Penny *v.* Watts (1848) 2 DeG. & Sm. 501, 521; *contra,* Jordan *v.* Black (N. C. 1811) 2 Murph. 30; see 2 Pomeroy, Eq. Jur., § 743.

[17]See 11 COLUMBIA LAW REVIEW 554.

[18]Pomeroy *v.* Benton (1874) 57 Mo. 531.

[19]Burdick, Partnership, *27 et seq.*

[20]Smith *v.* Howlett (N. Y. 1898) 29 App. Div. 182.

[21]Spier *v.* Hyde (N. Y. 1904) 92 App. Div. 467, 472.